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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEGRETTI & COMPANY, Plaintiff and Appellant, v. JURG HEUBERGER et al., Defendants and Respondents.	D051350 (Super. Ct. No. M-0108)

APPEAL from an order of the Superior Court of Imperial County, Joseph W. Zimmerman, Judge. Affirmed.

Allegretti & Company (Allegretti) appeals from an order dismissing its first amended verified petition for writ of mandate seeking to compel respondents Jurg Heuberger in his capacity as Director of the County of Imperial Planning Department, the County of Imperial, and Board of Supervisors members Victor M. Carrillo, Hank Kuiper, Joe Maruca, Gary Wyatt and Wally Leimgruber (collectively County) to issue a conditional use permit to reactivate a water well. The trial court had sustained County's

demurrer without leave to amend on grounds Allegretti's petition was barred by the 90-day statute of limitations prescribed by Government Code section 65009[1] and alternatively the petition could not state a claim in traditional mandamus to compel issuance of the permit. Allegretti contends the court erred by sustaining County's demurrer because its petition was governed by Code of Civil Procedure section 1085, not Government Code section 65009; that even if section 65009 applied its petition was timely; and County's failure to include the statutory language in section 65009 as to the content of public notice prevents it from relying on that section. Allegretti further contends it pleaded all of the necessary elements to support issuance of a traditional writ. Because we agree Allegretti's petition was not timely served within the 90-day statute of limitations, we affirm the dismissal order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Allegretti owns farmland in Imperial County that overlies groundwater basins that it accesses for irrigation purposes through deep water wells and pumps. In 1994, Allegretti applied for a conditional use permit to redrill an inoperable well in order to add

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1 All statutory references are to the Government Code unless otherwise indicated.

2 We take judicial notice of our prior unpublished and published opinions relating to this matter, *Allegretti & Company v. County of Imperial* (Apr. 19, 2000, D031154 [nonpub. opn.] (*Allegretti I*), and *Allegretti & Company v. County of Imperial* (2006) 138 Cal.App.4th 1261 (*Allegretti II*). (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Some of the background facts are taken from our opinion in *Allegretti II*. We take other material facts from Allegretti's verified first amended petition for writ of mandamus. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1115; *Jones v. Omnitrans* (2004) 125 Cal.App.4th 273, 277.)

approximately 200 acres of land to its crop production. In June 1997, County approved the conditional use permit subject to certain conditions, including one limiting Allegretti's draw of groundwater to 12,000 acre/feet per year from all production wells on the site. Allegretti declined to record that permit, instead filing suit against County for inverse condemnation. After the trial court sustained County's demurrer without leave to amend on grounds Allegretti had failed to exhaust administrative remedies, this court reversed the judgment on appeal in *Allegretti I*, holding Allegretti was not required to pursue a writ of administrative mandate before filing its action.

Following our decision in *Allegretti I*, the parties participated in mediation that resulted in a draft "Agreement for Conditional Use Permit #1142-94 For Water Wells" reflecting County's agreement to issue another conditional use permit (referred to by Allegretti as the "mediated permit") that would allow a specified amount of water usage for a limited time. On March 17, 2003, after several public hearings on the matter, County denied Allegretti's permit request.[3] On June 16, 2003, Allegretti filed a petition for writ of mandate to compel County to issue a permit to reactivate a water well without any condition limiting water usage "consistent with the appellate court opinion in

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[3] The record contains minutes of the Imperial County Board of Supervisors hearing dated March 17, 2003, in which the board voted to uphold the planning commission's decision to deny the conditional use permit. County stated that for purposes of its demurrer it assumed the challenged action occurred on March 17, 2003, which was the date Allegretti alleged in its petition. County pointed out Allegretti had filed one application for a conditional use permit which had been *granted* (with the challenged water extraction limitation) on June 17, 1997, and thus any argument by Allegretti that County should have issued an unrestricted permit was "clearly time-barred."

[*Allegretti I*]." Thereafter, proceedings on the writ petition were stayed pending a decision in Allegretti's inverse condemnation case, which on appeal culminated in our April 2006 opinion in *Allegretti II*.

On April 18, 2007, Allegretti filed its first amended verified petition (amended petition) seeking an order compelling County to issue the mediated permit or alternatively to issue a permit enabling it to reactivate a water well without any condition limiting usage. County demurred to the amended petition in part on grounds (1) the original petition was not served within the time prescribed by law; (2) the action requested was discretionary action entrusted to County, the exercise of which a court could not compel in any particular manner; and (3) a court could not compel the requested action because it would require County to violate the California Environmental Quality Act (CEQA). County argued that Government Code section 65009, subdivision (c) required any petition challenging its March 17, 2003 decision to be filed *and served* within 90 days of that decision – no later than June 16, 2003 – and because service was first effected on respondent Heuberger eight days after that deadline, the petition was untimely.

As to the statute of limitations, Allegretti responded its petition was timely because it was not brought under Government Code section 65009 or Code of Civil Procedure section 1094.5, but rather under Code of Civil Procedure section 1085, which does not contain any filing or service deadline. Characterizing Government Code section 65009 as a "housing and zoning ordinance statute," Allegretti argued it was irrelevant to the "water well" or "well construction" ordinance under which it filed its petition.

Allegretti alternatively argued that even if a 90-day limitations period applied, its petition was timely served under Code of Civil Procedure sections 416.50, subdivision (a) and 583.240, subdivision (d), because it diligently *attempted* to serve respondent Heuberger on June 16, 2003.

Ruling Allegretti's petition was barred by the statute of limitations contained in section 65009, subdivision (c)(1)(E), the trial court sustained County's demurrer without leave to amend and dismissed Allegretti's amended petition.[4] Allegretti filed this appeal.

DISCUSSION

I. *Motion to Augment Record*

Following completion of briefing, Allegretti moved to augment the appellate record with (1) a computerized print-out of provisions of the County of Imperial Municipal Code pertaining to judicial review of administrative decisions; (2) an October 21, 2004 stipulation and order in the lower court staying Allegretti's mandamus petition along with a reporters' transcript of a September 15, 2004 hearing (*Allegretti & Company v. Jurg Hueberger* et al. (Super. Ct. Imperial County, 2007, No. M-0108); (3) a Supplement to Hydrogeologic Investigation report prepared by Krieger & Stewart, Inc. dated October 24, 2002; (4) the index to the administrative record in *Allegretti &*

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4 The court alternatively ruled Allegretti's petition did not state a claim in traditional mandamus because the action requested was discretionary, preventing a court from mandating action in any particular manner, and a court could not substitute its judgment for County with regard to CEQA compliance or mitigation of potential environmental impacts. Because we resolve this appeal on statute of limitations grounds, we need not reach those aspects of the trial court's ruling.

Company v. County of Imperial (Super. Ct. Imperial County, No. 89640); and (5) the April 5, 2004 declaration of Dr. Ali Taghavi filed in *Allegretti & Company v. County of Imperial* (Super. Ct. Imperial County, 2004, No. 94756). In an accompanying declaration, Allegretti's counsel states these are "important relevant documents in the case," and he briefly explains his reason for the augmentation request. In particular, with respect to the stipulation and order to stay the action, counsel states Allegretti seeks augmentation "to demonstrate that there is no statute of limitations barring Allegretti's rights."

Under California Rules of Court, rule 8.155(a)(1), at any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include any document filed or lodged in the case in superior court. Augmentation of the record is not a matter of right and lies within the appellate court's discretion. (*Russi v. Bank of America* (1945) 69 Cal.App.2d 100, 102.) We grant Allegretti's request to augment the record with the parties' October 2004 stipulation to stay the mandate action pending the appeal in *Allegretti II*, because it is a document that was filed in the superior court in this case. However, as to the remaining documents, counsel does not state they were before the superior court considering County's demurrer or that they were mistakenly omitted from the appellate record. As to one of the documents – the index of administrative record in Imperial County Superior Court case No. 89640 – counsel states Allegretti seeks to establish that "the Montgomery Watson groundwater study was before the lower court." It is not clear whether counsel refers to the court in which this writ petition was

pending (case No. M-0108) or some other superior court action, such as the action for which the administrative record was prepared (case No. 89640).

Because there is no indication the above referenced documents were part of the record considered by the trial court in sustaining County's demurrer, we deny Allegretti's request to augment the record on appeal with these items. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 ["Augmentation does not function to supplement the record with materials not before the trial court"]; *In re Marriage of Forrest & Eaddy* (2006) 144 Cal.App.4th 1202, 1209 ["[A]ugmentation may be used only to add evidence that was mistakenly omitted when the appellate record was prepared"]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 ["As a general rule, documents not before the trial court cannot be included as a part of the record on appeal"].) Our conclusion would not change even if we were to construe Allegretti's request as one asking this court to take new evidence on appeal. That power is to be used " 'sparingly,' " and is only appropriately exercised when required by " 'the interests of justice.' " (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1257, 1259; see also *Vons Companies*, at p. 444, fn. 3 [requiring exceptional circumstances to take evidence under Code of Civil Procedure section 909].) Allegretti has not shown such exceptional circumstances.

II. *Demurrer*

A. *Standard of Review*

"We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether, as a matter of law, the complaint (in

this case, the petition) states a cause of action on any available legal theory. [Citation.] In doing so we assume the truth of all material factual allegations, and we are required to accept them as such, together with those matters subject to judicial notice. [Citation.] Statutory interpretation is a question of law subject to our independent review. [Citation.] A demurrer is properly sustained without leave to amend where the pleading discloses on its face that the action is barred by the applicable statute of limitations." (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524.)

B. *Government Code section 65009, subdivision (c)(1)(E)*

As relevant here, section 65009 provides: "(c)(1) Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] . . . [¶] (E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." "Government Code sections 65901 and 65903 provide for hearing and decision on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 766, fn. 2

(*Travis*); see also *Royalty Carpet Mills, Inc. v. City of Irvine, supra,* 125 Cal.App.4th at p. 1119, fn. 6.)[5]

The California Supreme Court discussed the intent of section 65009 and its shortened limitations period in *Travis*, *supra*, 33 Cal.4th 757: "Located in division 1 (Planning and Zoning) of title 7 (Planning and Land Use) of the Government Code, section 65009 is intended 'to provide certainty for property owners and local governments regarding decisions made pursuant to this division' (§ 65009, subd. (a)(3)) and thus to alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' (*id*., subd. (a)(2)) created by potential legal challenges to local planning and zoning decisions. [¶] To this end, section 65009 establishes a short statute of limitations, 90 days, applicable to actions challenging several types of local planning and zoning decisions: the adoption of a general or specific plan (*id*., subd. (c)(1)(A)); the adoption of a zoning ordinance (*id*., subd. (c)(1)(B)); the adoption of a regulation attached to a specific plan (*id*., subd. (c)(1)(C)); the adoption of a development agreement (*id*., subd. (c)(1)(D)); and the grant, denial, or imposition of conditions on a variance or permit (*id*., subd. (c)(1)(E)). Subdivision (e) of

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5 Government Code section 65901, subdivision (a) provides: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. The board of zoning adjustment or the zoning administrator may also exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business."

the statute provides that after expiration of the limitations period, 'all persons are barred from any further action or proceeding.' " (*Travis*, 33 Cal.4th at pp. 765-766.)

In order to meet the timing requirements of section 65009, a petition falling within its ambit must be both filed *and personally served* within 90 days of the legislative body's decision. (§ 65009, subd. (c)(1); *Royalty Carpet Mills, Inc. v. City of Irvine*, *supra*, 125 Cal.App.4th at p. 1119; *Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 947-948; *Gonzales v. County of Tulare* (1998) 65 Cal.App.4th 777, 783 [decided under former sections 65009, 65907].) The 90-day time limit begins to run from the date the final decision is made. (*Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1571.)

Travis and lower court decisions apply section 65009, subdivision (c)(1)(E) broadly to all types of challenges to permits and permit conditions, as long as the challenge rests on a "decision" of a local authority relating to a permit or seeks to "determine the reasonableness, legality, or validity of any condition attached to a . . . conditional use permit, or any other permit." (§ 65009, subd. (c)(1)(E); *Travis*, *supra*, 33 Cal.4th at pp. 766-768; *Honig v. San Francisco Planning Dept.*, *supra*, 127 Cal.App.4th at p. 526 [Government Code section 65009 establishes a short statute of limitations to "both the filing and service of challenges to a broad range of local zoning and planning decisions"]; *Royalty Carpet Mills, Inc. v. City of Irvine*, *supra*, 125 Cal.App.4th at p. 1114 ["Government Code section 65009 subdivision (c)(1)(E) applies generally to challenges to a conditional use permit . . . [¶] . . . The legislative policies of . . .

Government Code section 65009 support a short period by which a party may challenge a public agency's action regarding a conditional use permit"].)

In *Travis, supra*, 33 Cal.4th 757, the court was required to decide whether particular claims in a petition for writ of mandate fell within the ambit of section 65009. There, landowner/plaintiffs challenged a county board of supervisor's adoption in 1981 of an ordinance imposing conditions on development permits; the landowners' petition asserted the ordinance was preempted by a state laws enacted well after the ordinance, required them to violate other state nondiscrimination laws, and worked a taking of property without compensation in violation of the U.S. Constitution's Fifth Amendment. (*Travis*, at pp. 763-764.) The Court of Appeal affirmed the petition's denial on grounds it was untimely under section 65009. (*Travis*, at p. 765.)

The high court affirmed that decision in part and reversed it in part. Observing that the plaintiffs had alleged the county had violated its legal duties or exceeded its lawful authority in imposing the conditions, had unsuccessfully sought removal of the conditions at the administrative level, and prayed for orders requiring the county to cease imposing such conditions (*Travis*, *supra*, 33 Cal.4th at p. 766), the court found plaintiffs' action to be partly one to " 'determine the . . . validity' " of conditions imposed on their permits, and to " 'void or annul' " the decisions imposing those conditions. (*Ibid.*, quoting § 65009, subd. (c)(1)(E).) The court rejected arguments by the county that the plaintiff's constitutional challenge was facial and thus fell under a different provision, section 65009, subdivision (c)(1)(B), which the county argued set an earlier trigger date for the limitations period: "Plaintiffs' claim of unconstitutionality . . . is not 'a facial challenge to

the . . . ordinance predicated on a theory that the mere enactment of the . . . ordinance worked a taking' [citation], but, rather, a claim that the County effected a taking by demanding invalid exactions as a condition of issuing them second unit permits. Plaintiffs' preemption arguments, to be sure, go solely to the Ordinance's facial validity, but their complaint, as we have seen, is aimed not only at the Ordinance's enactment or existence but also at the County's *enforcement* of the Ordinance against plaintiffs' own property." (*Travis*, 33 Cal.4th at p. 767.) The court eschewed labels placed by plaintiffs on their claims that were intended to avoid application of the statute: "Section 65009, subdivision (c)(1)(E), in setting a time limit for actions challenging permit conditions, does not purport to restrict the legal theories or claims that may be made in such an action, and we see no justification for reading such a substantive limitation into the clear procedural language of the statute. Subdivision (e) of section 65009 provides that after expiration of the limitations period, 'all persons are barred from *any* further action or proceeding.' (Italics added.) A plaintiff, therefore, may not avoid the short 90-day limit of section 65009 by claiming that the permit or condition is 'void' and thus subject to challenge at any time. [Citations.] By the same token, an action is not removed from the purview of section 65009, subdivision (c)(1)(E) merely because the plaintiff claims the permit or condition was imposed under a facially unconstitutional or preempted law." (*Travis*, at pp. 767-768.)

Analogizing to decisions concerning local government development fees, the court concluded that to the extent one of the landowners sought a finding that the ordinance could not be applied against him as well as relief in the form of removal of the conditions

on his development permit, his challenge was to the county's decision imposing the conditions, coming within the statute and requiring it to be brought within 90 days of the final administrative action. (*Travis*, *supra*, 33 Cal.4th at p. 769.) However, to the extent the landowner challenged the continued enforcement of the ordinance despite its preemption by a later-enacted statute, the court held that challenge was subject to the three-year limitations of Code of Civil Procedure section 338; that action was not one to " 'attack, review, set aside, void, or annul the decision of a legislative body to *adopt* . . . a zoning ordinance.' " (*Travis*, 33 Cal.4th at pp. 771-772.)

In *Royalty Carpet Mills, Inc. v. City of Irvine*, *supra*, 125 Cal.App.4th 1110, the Court of Appeal held the limitations period of section 65009, subdivision (c)(1)(E) applied to a petitioner's challenge to the city's issuance of a conditional use permit (accompanied by its adoption of a mitigated negative declaration) on grounds the city should have prepared an environmental impact report. (*Royalty Carpet Mills, Inc.*, at pp. 1114, 1116.) The court held the 90-day period was an "absolute cut-off" and a limitations bar (*id*. at p. 1115), even though the parties had agreed to extend the petitioner's time for service under a different potentially applicable limitations period contained in the Public Resources Code, which allowed extensions for good cause shown. (*Royalty Carpet Mills, Inc.*, at p. 1115.) The court harmonized the two statutes, concluding that the absolute bar contained in the Government Code should be applied to accomplish the Legislature's purpose and policy of "prompt resolution of challenges to the decision of public agencies regarding land use" and also uphold section 65009's

express provision for automatic dismissal of petitions that do not comply with its shortened service period. (*Royalty Carpet Mills, Inc.*, at pp. 1121-1123.)

C. *Allegretti's Petition Is Subject to Government Code section 65009*

As Allegretti acknowledges, mandamus proceedings brought under Code of Civil Procedure section 1085 are subject to statutes of limitations that are determined "depend[ing] on the right or obligation sought to be enforced . . . ." (*Howard Jarvis Taxpayers Ass'n v. City of La Habra* (2001) 25 Cal.4th 809, 821; see also *Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10; *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 926 [question of which statute of limitation applies to Code of Civil Procedure section 1085 mandamus is to be resolved "not by the remedy prayed for but by the nature of the underlying right or obligation that the action seeks to enforce"]; *Ragan v. City of Hawthorne* (1989) 212 Cal.App.3d 1361, 1366-1367.) It maintains that under this principle and due to the lack of a prescribed limitations period in Code of Civil Procedure section 1085, the four-year period of Code of Civil Procedure section 343 determines the timeliness of its petition, not Government Code section 65009, on which the trial court relied. Allegretti argues section 65009 is a "housing and zoning ordinance statute" that is not applicable to the ordinance under which it filed its permit, which is assertedly a "water well" ordinance, not a zoning or land use ordinance.

Allegretti has forfeited its first point as to the four-year limitations period of Code of Civil Procedure section 343 by failing to raise it in opposition to County's demurrer. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.) County does not argue forfeiture, instead asserting that even under Allegretti's proposed four-year limitations period, its

petition is still time-barred. We need not reach County's point because we conclude Allegretti's petition is subject to Government Code section's 65009 90-day period for service and filing.

Looking to the nature and underlying goals of its action (e.g., *Travis, supra*, 33 Cal.4th at pp. 766-768), Allegretti's original and amended petition both sought to have County issue a conditional use permit without a water use limitation, and its amended petition alternatively sought judicial review of County's decision to deny issuance of the mediated permit. Allegretti alleged that County had no present standards under which it could regulate water usage, and "[w]ithout standards, [County] had a clear duty to issue the Mediated Permit or a permit without limiting Petitioner's groundwater usage." Allegretti's petition, at bottom, is one seeking judicial review of a "decision on the matters listed in section[] 65901," which includes "applications for conditional uses or other permits." (§§ 65009, subd. (c)(1)(E), 65901, subd. (a).) County's decision to deny Allegretti's requested permit falls squarely within that category. The original and amended petitions also fall into the category of an action to have the court "determine the . . . legality[] or validity of any condition attached to a . . . conditional use permit . . . ." (§ 65009, subd. (c)(1)(E).) By its terms, section 65009's 90-day limitation period applies to these types of claims.

Allegretti's arguments focusing on the nature of the underlying Imperial County ordinance are unavailing. First, section 65009 is not limited to zoning or housing ordinances; as *Travis* summarized, the section is one directed to a broad variety of land use and planning issues. Further, Allegretti mischaracterizes this court's opinion in

Allegretti I as holding the ordinance at issue – Chapter 3.5, section 56350 of the Codified Ordinances of the County of Imperial – was a "well construction" ordinance. *Allegretti I* only resolved the question of whether Allegretti was required to file a petition for writ of administrative mandamus prior to filing its action for inverse condemnation; while this court recited some of the ordinance's provisions, the opinion did not discuss or characterize the nature of the ordinances as either a zoning or well construction ordinance. An opinion is not authority for a point not raised, considered, or resolved. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 58-59; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) Further, the ordinance discussed in *Allegretti I* indeed required a person intending to drill a new well or reactivate an unused well to obtain a conditional use permit; this is the type of action expressly encompassed by section 65009. Allegretti points to no authority convincing us otherwise.

Further, we are unpersuaded by Allegretti's attempt to distinguish *Royalty Carpet Mills, Inc. v. City of Irvine*, *supra*, 125 Cal.App.4th 1110 as a case involving a "zoning variance" unlike the present case. The Court of Appeal in *Royalty Carpet* focused on the fact that the petition in that case, as here, concerned issuance of a conditional use permit; its decision did not turn on the fact there may have been an underlying zoning ordinance that was the subject of the petition. Further, Allegretti's efforts to label its petition as one not involving zoning or housing is contrary to the principles expressed by the California Supreme Court in *Travis*, which rejected petitioner's attempt to label their claims so as to fall outside the limitations period.

Nor will we address Allegretti's additional arguments made in its reply brief (that were likewise omitted from its opposition papers in the trial court): that its petition is governed by Code of Civil Procedure section 1094.6, or that County's own ordinance addressing judicial review is silent as to timing of service. " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.' " (*Newton v. Clemons*, *supra*, 110 Cal.App.4th 1, 11, fns. omitted.) "Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack. [Citation.] Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

D. *Allegretti's Petition was Not Timely Served Under Section 65009*

We turn to Allegretti's alternative arguments reiterating its points made in opposition to County's demurrer. Allegretti first argues that even if the 90-day limitations period of section 65009 applies, its inability to serve respondent Heuberger in a timely manner was due to causes "beyond [its] control," and thus the time spent in

service attempts should be excluded in determining timely service under Code of Civil Procedure section 583.240.[6]

We are unpersuaded by Allegretti's argument. Assuming without deciding that Heuberger was a proper agent for service of process on County (Code Civ. Proc., 416.50),[7] Code of Civil Procedure section 583.240 enumerates statutory exceptions to the mandatory three-year period to perfect service of a summons and complaint on a defendant, one being that service was "impossible, impracticable, or futile due to causes beyond the plaintiff's control." (Code Civ. Proc., §§ 583.210, 583.240, subd. (d); *Shipley v. Sugita* (1996) 50 Cal.App.4th 320, 324.) The tolling provision is not on its face applicable to service of a petition for writ of mandate subject to the shortened limitations period of Government Code section 65009, under which time is of the essence and which

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6 Code of Civil Procedure section 583.240 provides: "In computing the time within which service must be made pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] (a) The defendant was not amenable to the process of the court. [¶] (b) The prosecution of the action or proceedings in the action was stayed and the stay affected service. [¶] (c) The validity of service was the subject of litigation by the parties. [¶] (d) Service, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control. Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control for the purpose of this subdivision."

7 County points out that Code of Civil Procedure section 416.50 requires that service on a public entity (here, the County of Imperial) be made by delivering a copy of the summons and complaint to "the clerk, secretary, president, presiding officer, or other head of its governing body," and under that provision service should have been effected on the Chairman or Clerk of the Imperial County Board of Supervisors. County also asserts that at the time the original petition was filed, Allegretti did not name the County or Board of Supervisors as a party, and thus even if Allegretti had served Heuberger within the 90-day period, it would not have been effective service on the legislative body under Government Code section 65009. We need not resolve these points.

"mandates strict compliance with the statute of limitations and service period." (*Wagner v. City of South Pasadena, supra*, 78 Cal.App.4th 943, 948, 950.)

Even if the tolling provision were applicable, Allegretti has not demonstrated that its inability to serve Heuberger (on grounds he was "unavailable") was due to matters beyond its control, other than stating the matter as an ipse dixit. The declaration of diligence in the record indicates the process server attempted service on June 16, 2003, at 4:20 p.m., but that Heuberger was "not in [the] office." The remaining attempts, all made after the June 16, 2003 deadline, indicate they were unsuccessful either because Heuberger was not in the office or not working that day. "The excuse of impossibility, impracticability, or futility should be strictly construed in light of the need to give a defendant adequate notice of the action so that the defendant can take necessary steps to preserve evidence." (Cal. Law Revision Com. com, 16 West's Ann. Code Civ. Proc. (2008 supp.) foll. § 583.240, p. 126; *Williams v. Los Angeles Unified School Dist.* (1994) 23 Cal.App.4th 84, 102 [exclusion of subdivision (d) for service that is impossible, impracticable or futile must be strictly construed against the plaintiff]; *Scarzella v. DeMers* (1993) 17 Cal.App.4th 1762, 1770-1771.) In keeping with this strict construction, one court declined to excuse a Chapter 11 bankruptcy debtor from failing to serve a defendant in a timely manner because a cause of action brought by a debtor is not tolled by the Bankruptcy Act and the plaintiff debtor could have sought an order compelling the bankruptcy trustee to maintain the action. (*A. Groppe & Sons Glass County., Inc. v. Fireman's Fund Ins. Co.* (1991) 232 Cal.App.3d 220, 225-227.) The Court of Appeal held the trial court did not abuse its discretion in declining to apply the

excuse of impossibility, impracticability or futility. (*Id*. at p. 227.) In this case, absent any further explanation as to why it was impossible to serve Heuberger in a timely manner, we likewise conclude the trial court here did not abuse its discretion in rejecting application of the subdivision (d) exception of Code of Civil Procedure section 583.240.

Allegretti next argues County's failure to provide notice set forth in section 65009, subdivision (b)(2) renders the statute as a whole inapplicable. We reject the argument. Subdivision (b) of section 65009 states: "(1) In an action or proceeding to attack, review, set aside, void or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following: [¶] (A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence. [¶] (B) The body conducting the public hearing prevented the issue from being raised at the public hearing. [¶] (2) If a public agency desires the provisions of *this subdivision* to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: 'If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing.' " (Italics added.)

As the above italicized portion demonstrates, section 65009 subdivision (b)(2) requires a public agency to give the above-described notice if it desires *subdivision (b)* of

the statute to apply. In other words, the agency must give such notice if it seeks to preserve an ability to object to new issues or challenges raised to the agency's decision that were not raised prior to the public hearing in writing delivered to the agency or at the public hearing. (E.g. *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 993.) Subdivision (b)(2) of section 65009 simply does not prevent application of any remaining subdivision of section 65009, including subdivision (c) containing the 90-day statute of limitations.

Based on the foregoing, we conclude the trial court properly sustained County's demurrer without leave to amend on the ground Allegretti's petition for writ of mandate is barred by the 90-day statute of limitations.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.